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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 775

ADOLPHUS HOHENSEE,

Petitioner,

vs.

WILLIAM K. BLETHEN, ET. AL.,

Defendants,

and

STUART K. NIELSEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	2
Statement	3
How Federal Questions Were Raised	5
Reasons for Granting Writ	5
Conclusion	8
Appendix	9

Citations

A.C.L. R.R. Co. vs. Shields, 220 F. 2d 242	6
Associated Resources Corp. vs. Hallisburton, 238 F. 2d 957, 959	6
Denny-Renton etc., vs. National Surety Co., 93 Wash. 103, 160 P. 1	7
Griffin vs. Griffin, 327 U.S. 220	8
Hayes vs. Pearcy, 54 Wash. 78, 102 P. 889	7
Leishman v. Associate Wholesale Elec. Co., 18 U.S. 203	6
Onishi vs. Sup. Ct. for King County, 30 Wash. 2d 703, 191 P. 2d 703	3
Papanikolaou v. Atlantic Freighters, Ltd., 232 F. 2d 663, 666	6
Payne vs. Kochler, 225 F. 2d 103, 105	6
Pennoyer vs. Neff, 95 U.S. 714	8
State vs. Plummer, 130 Wash. 135, 226 P. 273	7
Stanfill vs. Defenback, 239 F. 2d 685	6
Stevens vs. Turner, 222 F. 2d 352	6
Terrasi vs. Atlantic Lines, 226 F. 2d 823	6
Wesley vs. Schneckloth, 55 Wash. 2d 90, 346 P. 2d 658	7
Court Rules	4, 5, 7

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Adolphus Hohensee prays that the writ of certiorari issue to review the Judgment of the Supreme Court of Washington entered on November 6, 1961, in the above entitled cause, dismissing petitioner's appeal.

Opinions Below

No opinions were handed down by either of the Courts below.

The Judgments and orders of the courts below are appended hereto. (Also R. 5-53)

Jurisdiction

The time for filing petition for writ of certiorari in this Court was extended to and including March 6, 1962, by order of this Court dated February 5, 1962. The judgment of the Supreme Court of Washington was entered on November 6, 1961: The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1257(3).

Questions Presented

1. Did the Supreme Court of Washington err in dismissing petitioner's appeal?

2. Did the Superior Court of the State of Washington err in dismissing petitioner's motion to vacate judgment?

3. Did the said Superior Court err in awarding judgment to respondent against petitioner?

Constitutional and Statutory Provisions

The relevant and offended provisions of the 14th Amendment to the Federal Constitution are as follows: " . . . nor shall any state deprive any person of life liberty or property without due process of Law, nor deny to any person the equal protection of the Laws."

The pertinent statutory provisions and rules of the Courts are found in the official State Reports at 34a Wash. 2d, pages 33, 77 and 78, and are set out in the "Reasons for granting the writ."

Statement

The Respondent, Stuart K. Nielson was engaged by the petitioner, on a contingent fee agreement basis, to prosecute a libel action against William K. Blethen, et. al.,

The suit was originally filed in the Federal Court at Seattle, Washington, under diverisity of citizenship. 28 U.S.C. 1332. (R. 27-40)

Without consultation with petitioner respondent transferred the case to the Superior for King County, at Seattle, Wash. The respondent later gave as his reason for such transfer his un-familiarity with the Federal Rules of Civil Procedure. (R. 24-32)

That upon transfer of the case to the state court the Defendants sought discovery proceeding in the form of depositions. At the time of the said discovery proceeding, the law of the State of Washington, evidenced by the case of "*Onishi vs. Superior Court for King County,*" 30 Wash. 2d 703, 191 P. 2d 703, did not require a non-resident litigant to appear for deposition. This was likewise explicit in Section 1215 of Remington Revised Code of Washington (Sec. 5.56.010 of the Revised Code). That notwithstanding the discovery law of Washington as aforesaid, the Respondent failed to advise petitioner of same and failed to object to the discovery proceedings. That thereafter the Defendants, William K. Blethen, et al., filed a petition in the pending action for judgment against the petitioner for costs of the depositions. This petition was returnable on April 24, 1959. (R. 22-23)

The Respondent, Stuart K. Nielson, likewise filed his petition to withdraw as counsel for petitioner, and in the same petition asked the court to award him judgment for attorney's fee against the petition in the sum of $15,000.00

Both petitions were served by mail on petitioner at "P.O. Box 910, Scranton, Pennsylvania." (R. 22-23)

The Superior Court awarded judgment for Respondent in the amount of $1,500.00 and in favor of William K. Blethen, et al. in the sum of $1,100.00. These judgments were awarded on April 24, 1959 and the petitions were filed on March 24, 1959. (R. 21)

The petitioner raised the constitutional issue in his answer, and his motion to continue the matter until he could secure new counsel to represent him. The court turned a deft ear to petition's request. Petitioner was not present for the hearing on April 24, 1959. (R. 20)

Thereafter on May 29, 1959, petitioner filed his motion to vacate said judgment pursuant to the provisions of Rule 13 of the Rules of Pleading, Practice and Procedure, 34-A Wash. 2d-77, 78, but, the superior failed to enter an order "fixing the date and place of hearing" as provided by said Rule 13. (R. 13) On March 10, 1961, the Superior Court entered an order dismissing petitioners "motion to vacate judgment," for the want of prosecution. (R. 1-5) That thereafter on April 5, 1961, the petitioner filed his "notice of appeal," and filed a cost bond on appeal in the sum of $300.00. The record from the Superior Court was then duly certified to the Supreme Court of Washington. That thereupon the Respondent moved to dismiss the appeal on the ground that the notice of appeal was not filed within 30 days of the judgment entry. (R. 46) The Supreme Court of Washington dismissed the appeal by the entry of its judgment on November 6, 1961. (R. 53) The Superior Court likewise permitted the respondent to confiscate the $300.00 cash costs bond and apply same on account of his $1,500.00 judgment, notwithstanding the pendency of the petition herein to this court, as stated by Respondent. This petition therefore seeks to have this correct the inequities enumerated above.

How Federal Questions Were Raised

Substantial federal questions were raised in the Superior Court for King County in challenging the validity of the service which gave rise to the judgment.

Additional federal questions were raised in the Supreme Court of Washington.

Reasons for Granting the Writ

A. *The judgment of the Supreme Court of Washington denies petitioner the equal protection of the law*

While it is true that the Supreme Court of Washington expressd no opinion in dismissing petitioner's appeal, yet, it is obvious from the record that its judgment was buttressed on the issue of the timeliness of filing of the notice of appeal.

The judgment of the Respondent was entered on the 24th day of April, 1959. Petitioner filed his motion to vacate said judgment on May 29th, 1959. On March 10, 1961, the superior court entered its judgment dismissing petitioners motion to vacate.

On April 5th, 1961, petitioner filed his notice of appeal in the superior court pursuant to the provisions of Rule 33 of the Rules on Appeal of the Supreme Court of Washington.

It is the position of petitioner that the notice of appeal was filed within the 30 days allowed under said Rule 33. See 34A Wash. 2d 33. This is especially true since Rule 13 of the Rules on Pleading, Practice and Procedure, applicable to the superior courts, provides that a motion to vacate or modify a judgment may be filed any time within one year of the date of the entry of said judgment. See 34A Wash. 2d 77.

The issue, therefore, presented to the Supreme Court of Washington, by the respondent in his motion to dismiss the appeal, was: Did the time for filing the notice of appeal begin to run from the entry of judgment on April 24, 1959, or upon the order rejecting the motion to vacate entered on March 10, 1961.

This court has held in the case of *Leishman* vs. *Associate Wholesale Electric Co.*, 318 U.S. 203, that where petition for rehearing, motion for new trial, or motion to vacate, amend or modify judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion.

The above holding of this court has been followed by the overwhelming body of decisions including the following: *Atlantic Coast Line R.R. Co.* vs. *Shields*, 5 Cir., 220 F.2d 242, *Associated Resources Corp.* vs. *Halliburton, etc.*, 8 Cir., 238 F.2d 957, 959, *Paine* vs. *Koehler*, 8 Cir., 225 F.2d 103, 105, *Stevens* vs. *Turner*, 7 Cir., 222 F.2d 352, *Panikolaou* vs. *Atlantic Freighters, Ltd.*, 4 Cir., 232 F.2d 663, 666, *Terrasi* vs. *S. Atlantic Lines*, 2 Cir., 226 F.2d 823, and in *Stanfill* vs. *Defenbach*, 9th Cir., 239 F.2d 685, Denman Chief Judge, held that the time began to run from the entry of the order denying the motion to amend the judgment.

Petitioner further contends that he was denied the equal protection of the law when the superior court dismissed his motion to vacate judgment in violation of Rule 13 of the Rules of Pleading, Practice and Procedure. The said Rule provides inter alia that: "upon the filing of the motion and affidavit the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted." See, 34A Wash. 2d 77.

That although petitioner complied with every provision of the above Rule 13, the superior court has never set a date and place for the argument or hearing on the motion to vacate.

B. *The superior court erred in dismissing petitioner's motion to vacate judgment*

The judgment secured by the Respondent against the petitioner, on April 24, 1959, was void abinitio as seen from the decisions of this court as well as the Supreme Court of Washington. Thus in the case of *Hays* vs. *Pearce*, 54 Wash. 78, 102 P. 889, the latter court held that a personal judgment entered against a party upon service by publication was void. Similar holdings were reached by the Supreme Court of Washington in the cases of *Denny Renton, etc.* vs. *National Surety Co.*, 93 Wash. 103, 160 P. 1 and *State* vs. *Plummer*, 130 Wash. 135, 226 P. 273.

In *Wesley* vs. *Schneekloth*, 55 Wash. 2d 90, 346 P. 2d 658, the High Court of Washington Said:

> "a constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction. If it does not have jurisdiction, any judgment entered is void—ab initio—and is in legal effect, no judgment at all."

The record clearly shows that petitioner filed a variety of pleading in the Superior Court for King County challenging the constitutionality of the "mail service" effected on him.

The action filed, by Respondent in the Superior Court for King County, against petition, represented a new action, separate and distinct from the libel suit he filed on behalf of petitioner.

Moreover, the Superior Court for King County was under a statutory compulsion to set a date and place for hearing on petitioner's motion to vacate judgment filed on May 29, 1959. This failure on the part of the court not only denied petitioner the equal protection of the law, but also deprived him of due process of law.

Petitioner further urges that Respondent's $1500.00 judgment secured in the Superior Court against him, represents a money judgment. Such judgment rests on substitute service and not personal service as required by this court in the cases of *Pennoyer* vs. *Neff*, 95 U.S. 714, and *Griffin* vs. *Griffin*, 327 U.S. 220.

Conclusion

That by reason of the unimpeachable fact that the petitioner, who was the Plaintiff in libel action against the defendants, filed by the Respondent as attorney for Petitioner, is now the victim of judgments aggregating $2,600.00, without being afforded a trial on the merit. Petitioner says this coupled with the constitutional denials enumerated above, afford adequate grounds for the granting of the writ of certiorari which he respectfully requests.

Reginald B. Jackson,
930—F—St., N. W.,
Washington, D. C.
Counsel for Petitioner.

APPENDIX

In the Supreme Court of the State of Washington,
September Session A. D. 1961

Be It Remembered, That at a regular session of the Supreme Court of the State of Washington, begun and holden at Olympia, on the second Monday of September, A.D. 1961, it being the eleventh day of said month, among other, the following was had and done, to wit:

Tuesday, November 7th, 1961.

Adolphus Hohensee, *Appellant*,

v.

William K. Blethen, et al., *Defendants*,

and

Stuart K. Nielsen, *Respondent*.

Judgment No. 36204

King County No. 499480

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 7th day of November, A. D. 1961, on motion of David Bailey Smith, Esquire, of counsel for respondent, considered, adjudged and decreed, that the appeal from the judgment of the said Superior Court be, and the same is, hereby dismissed and stricken without costs.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

I, William M. Lowry, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing

is a true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 7th day of November, A. D. 1961:

WILLIAM M. LOWRY,
Clerk of the Supreme Court, State of Washington.

By ——, ——,
Deputy.

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(1426-6).

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE RESPONDENT OPPOSING CERTIORARI

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METROPOLITAN PRESS AND WESTERN

SUBJECT INDEX

	Page
Corrected Statement	1
Reasons for Denying the Writ	4
I. Petitioner Argues: (1) That notice of appeal from the judgment of April 22, 1959, given April 5, 1961, was timely; and (2) That the Superior Court never obtained jurisdiction of petitioner, so the judgment is void	4
II. The Superior Court did have jurisdiction to enter the judgment	5
III. The Judgment of the Supreme Court of the State of Washington was correct and no constitutional question is involved	7
Conclusions	8

TABLE OF CASES

Goodwin v. Castleton, 31 Wn.(2d) 701, 198 P.(2d) 678	8
Griffin v. Griffin, 327 U.S. 220, 90 L.ed. 640	6
Jamlin v. Case, 188 Wash. 150, 61 P.(2d) 1287 (1936)	6
Payette v. Willis, 23 Wash. 299, 63 Pac. 254 (1900)	6
Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707 (1902)	6
State v. Moore, 34 Wn.(2d) 351, 208 P.(2d) 1207 (1949)	6
Yand's Estate, 23 Wn.(2d) 831, 162 P.(2d) 434 (1945)	5

STATUTES

RCW 2.44.040	5
RCW 60.40.010	5
RCW 60.40.030	6
RCW 4.76.060	5

RULES

	Page
Rules on Appeal, Rules 8, 32, 33, 43, 44	4, 5, 7
Rules of Pleading, Practice and Procedure, Rule 40.04W, 41.04W, 54.04W, 60.04W	3, 5, 7, 8
Rules of the Supreme Court, Rule 56(4)	8
U.S. District Court, Rule 52(b)	4

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BRIEF FOR THE RESPONDENT OPPOSING CERTIORARI

CORRECTED STATEMENT

Petitioner originally engaged W. H. Morris of Wichita, Kansas, as his national counsel to sue for libel against various parties, J. P. Tonkeff, attorney of Yakima, Washington, as trial counsel, and respondent, Stuart K. Nielsen, as local counsel for a libel action against William K. Blethen, et al., at Seattle, Washington.

The action was commenced in the Superior Court of the State of Washington for King County. The defendants in the suit removed it to the U. S. District Court. By agreement of petitioner and all his counsel, the suit on motion and after hearing was remanded.

The defendants gave notice of the taking of petitioner's deposition in Seattle. Respondent opposed such depositions as not being proper under state court rules and decisions, claiming petitioner could not be forced to appear in this manner away from his residence.

The court disagreed with such objections and respondent was only able to obtain a delay as to the time of the deposition. Thereupon respondent informed petitioner of such adverse decision and advised an appeal from the order. Petitioner did not desire an appeal and proposed a convenient date for him to be present at the deposition. Such a date was arranged.

Petitioner requested respondent to arrange for depositions of certain defendants for the same time and place. This was done.

At the discovery deposition, petitioner refused to answer many questions propounded to him, that respondent advised him he was required to answer under State Court Discovery Rule 26.

Petitioner became angry with respondent and discharged him as his attorney and refused to cooperate further in the proceedings.

Defendants cited petitioner into court under the rules for failure to answer questions properly propounded at the deposition and requested penalties by way of costs and attorney fees.

Respondent, discharged, but still the only attorney of record, advised petitioner of such proceedings and petitioned the court to establish the amount of his lien for services upon such discharge and to permit petitioner to

substitute other counsel.

Citation of petitioner was duly made to respondent's petition. Petitioner made answer thereto, admitting the discharge of respondent, claimed misconduct by respondent, asked permission to substitute other counsel, and submitted the matter to the court.

Based upon the answer of the petitioner, and evidence, the court thereupon on April 22, 1959, established the amount of respondent's lien for services and costs in the amount of $1530.00, entered judgment therefor and permitted petitioner to make substitution of other counsel.

No appeal was ever taken from this judgment.

Prior to this time petitioner had discharged both W. H. Morris and J. P. Tonkoff and has since appeared as his own attorney.

On May 29, 1959, petitioner filed a motion to vacate said judgment. No citation was ever issued or requested to bring this matter on for hearing.

On February 17, 1961, respondent moved to dismiss petitioner's motion to vacate for failure to prosecute for more than one year, as provided by court Pleading Rule No. 41.04W. Notice of hearing was mailed to petitioner with hearing set for March 10, 1961.

Petitioner filed a brief opposing said motion, and submitted said motion without oral argument. No reason having been submitted by petitioner that would cause Rule 41.04W not to apply, the court entered its order dismissing petitioner's motion to vacate the judgment.

Petitioner gave notice of appeal to the Supreme Court

of the State of Washington.

In October, after the filing of petitioner's brief on appeal, respondent moved to strike and to dismiss the appeal, under Rule 8, upon the grounds that (1) Petitioner's transcript failed to show the jurisdictional fact of notice of appeal, timely made; (2) The brief failed to state any appealable assignment of error, as provided by Rule 43, Rules on Appeal; (3) The appeal was made solely for delay.

Notice of hearing was given to petitioner. He failed to appear at the hearing in person or by counsel. At the time of said hearing, petitioner had failed to file with the State Supreme Court the transcript of the record on appeal, as required by Appeal Rule 44. Such transcript was received by the clerk prior to the entry of the court order dismissing said appeal.

From such proceedings, petitioner seeks his writ.

REASONS FOR DENYING THE WRIT

Petitioner Argues: (1) That notice of appeal from the judgment of April 22, 1959, given April 5, 1961, was timely; and (2) That the Superior Court never obtained jurisdiction of petitioner, so the judgment is void.

I

Petitioner incorrectly assumes the rules of the courts of the State of Washington are the same as Rule 52(b) of the U. S. District Courts. Thereunder, a motion to amend findings or judgment filed within ten days of the judgment, stays the commencing of the time for an appeal until such motion is acted upon. The cases cited are based upon such rule.

The Revised Code of Washington 4.76.060 provides a motion for new trial must be served and filed within two days of the entry of judgment. This is the only proceeding that stays the running of the thirty days in which an appeal must be commenced by serving and filing notice of appeal, in order to give the Washington State Supreme Court jurisdiction of an appeal, Appeal Rules Nos. 32 and 33. *Yand's Estate*, 23 Wn.(2d) 831, 162 P.(2d) 434 (1945).

Petitioner's motion to vacate was not filed until after thirty days from the entry of judgment. It was neither timely as an appeal, nor motion for new trial. It was a proceeding under Rule 60.04W, Rules of Pleading, Practice and Procedure.

This rule requires an affidavit showing grounds not available at the time of entry of judgment, and does not take the place of an appeal. It requires an order fixing the time and place of hearing to be prepared and presented by the moving party, Rule 54.04W. It must be served as summons in an original action. None of these requirements were complied with.

II

The Superior Court did have jurisdiction to enter the judgment.

Petitioner was the plaintiff in the action and submitted himself to the jurisdiction of the court for all purposes connected with the lawsuit.

Respondent was attorney of record for petitioner. Upon his discharge the court had jurisdiction to establish his lien for services and costs. RCW 2.44.040. RCW 60.40.010.

RCW 60.40.030. The petitioner appeared in answer to the citation therefor, filed his answer, admitting the discharge, made libelous charges against respondent, asked permission to substitute other counsel, and submitted the matter to the court for decision without his personal presence. He cannot complain of the decision he sought discharging his attorney and the consequent decision as to rights of that attorney as to his lien and to be paid for his services and expenses.

This right has been well established.

State v. Moore, 34 Wn.(2d) 351, 208 P.(2d) 1207 (1949);

Payette v. Willis, 23 Wash. 299, 63 Pac. 254 (1900);

Jamlin v. Case, 188 Wash. 150, 61 P.(2d) 1287 (1936);

Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707 (1902).

All the Washington cases as to lack of jurisdiction of the person cited by petitioner are in original proceedings. This principal has no application herein.

The Federal case, *Griffin v. Griffin*, 327 U. S. 220, 90 L.ed. 640, cited, is contrary to petitioner's contention. It was a proceeding to establish the amount of alimony *arrears*. It mentions mere notice being required for further proceedings in an action in which the court had original jurisdiction of the parties. In the cited case it was not given. Petitioner had adequate notice and sought and obtained requested relief at the hearing.

III

The Judgment of the Supreme Court of the State of Washington was correct and no constitutional question is involved.

Rule 44 of the Rules of Appeal established by the Supreme Court provides for preparation of a transcript of the record necessary for the appeal at the expense of the appellant, and the filing of the same with the clerk of the Supreme Court within *three* months after notice of appeal.

The appeal was taken by notice April 5, 1961. The transcript had not been filed with the Supreme Court at the date of hearing of the motion to dismiss November 3, 1961. Such transcript failed to show filing of notice of appeal, a jurisdictional fact. No request was made to correct this defect.

Petitioner's brief filed on appeal did not raise any assignment of error concerning the judgment dismissing the motion to vacate from which the appeal was taken. There was, therefore, no matter before the court for consideration, the appeal had not been diligently prosecuted, and dismissal of the appeal was proper. Rule of Appeal 43, 8.

Petitioner's actual appeal was from a dismissal of his incomplete motion to vacate the judgment of April 22, 1959, filed by him May 29, 1959.

After a year had elapsed without action thereon by the petitioner, a dismissal was asked for want of prosecution under Rule 41.04W and for failure to give notice or set forth adequate grounds therefor under Rule 60.04W.

Rule 41.04W was held to apply to a motion to vacate judgment in *Goodwin* v. *Castleton*, 31 Wn.(2d) 701, 198 P.(2d) 678.

The order of dismissal was therefore lawful and proper.

CONCLUSIONS

Petitioner is very anxious to commence law suits, adept at drawing and filing legal papers, misstating facts and charging attorneys with incompetence and misconduct. All his troubles come from his failure to follow legal advice and procedures and in wanting his own way at any cost.

Without filing any bond, he considers he is entitled to a stay of enforcement of the judgment by merely signifying his intention to appeal or seek a writ.

It is apparent that this proceeding is without merit and is taken solely for delay and to make unjust charges against respondent. The writ should be denied and respondent should thereon be awarded his costs and damages within the discretion of the Court, as provided by Rules of the Supreme Court 56(4).

Respectfully submitted,

MAURICE KADISH

Counsel for Respondent Opposing Certiorari